

The Honorable Judge John C. Coughenour

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Cause No. No. CR04-334JCC
v.	)	
	)	<b>Motion for Pre-Deposition Discovery</b>
KYLE GIANIS,	)	
	)	
Defendant.	)	NOTE FOR MOTION: May 2, 2008
_____	)	

Comes now the defendant, Kyle Gianis, through his attorney, Peter A. Camiel, and moves this Court to enter an order requiring the government to provide the following materials to the defense prior to the court ordered depositions of government witnesses Tsoukalas and Youngberg.

**Background**

On March 18, 2008, this Court entered an order pursuant to FRCrP 15(a) authorizing the government to take video depositions in Canada of David Youngberg and Adam Tsoukalas in this matter prior to May 23, 2008. This Court also ordered that the government make available for defense counsel for examination and use prior to the taking of the depositions any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at trial.

In compliance with local district court Rule 48 regarding Rule 16 discovery, defense counsel contacted the Assistant United States Attorney by phone and letter dated April 18, 2008 requesting the below described discovery be provided prior to the depositions of Misters Youngberg and Tsoukalas.

1 In response, the government has indicated that many of the documents (the guilty pleas, statements of  
 2 responsibility and the presentence reports) are under seal and will require this Court's permission to  
 3 produce. More importantly, the government has also indicated, "You should also anticipate that many  
 4 of the items will be produced rather close to trial and/or in redacted form due to the same concerns set  
 5 forth above." Those concerns had to do with safety of the witnesses. In this case, given the prospect that  
 6 the depositions will be used in lieu of live testimony at trial, all of the requested discovery should be  
 7 produced prior to the depositions rather than "close to trial." The government has indicated that it has  
 8 tentatively scheduled depositions for the 13<sup>th</sup> and 14<sup>th</sup> of May in order to comply with this Court's order  
 9 that depositions be taken no later than the 23<sup>rd</sup> of May. It has not yet been confirmed whether or not  
 10 depositions will in fact take place on those dates.

11 By this motion, the defendant seeks an order of the Court directing the government to disclose  
 12 additional materials related to the two witnesses scheduled to be deposed, including the following:

- 13 1. Plea agreements of each of the witnesses;
- 14 2. Any grand jury testimony of either of the witnesses by any other witnesses or describing or  
 15 containing any statements made by either of the witnesses relevant to this matter;
- 16 3. Notes and reports of any interviews conducted with either of the witnesses;
- 17 4. Writings of any of the witnesses related to this matter, including any "acceptance of  
 18 responsibility" letters by either witness;
- 19 5. The presentence report of each witness to be provided to the Court in-camera for review and  
 20 for the Court to determine any portions that should be disclosed; and
- 21 6. Any reports received from the RCMP about those witnesses criminal histories, arrests, or  
 22 police contacts.

23 Presently, the Court has entered an order allowing the taking of depositions, but has not yet  
 24 determined whether or not those depositions will be permitted to be used at trial in lieu of live testimony  
 25 of the witnesses. Given the uncertainty of the status of the witnesses and their depositions, defense  
 26 counsel must assume for purposes of cross examination during the depositions of the witnesses that he

1 must cross examine the witnesses as he would at trial using any available impeachment information. In  
 2 addition, defense counsel must be able to conduct a proper investigation of the witnesses and their  
 3 backgrounds prior to the depositions.

4 The Court's current order is limited to directing the government to disclose "any statement of the  
 5 witness." By this motion, the defendant is requesting additional materials to which he is entitled.

#### 6 **Plea Agreements**

7 The plea agreements reports of David Youngberg and Adam Tsoukalas have been filed under seal  
 8 and have not been disclosed in discovery. Presumably, they contain cooperation provisions and  
 9 government promises in return for said cooperation and other relevant representations that the defendant  
 10 would be entitled to use on cross examination of each witness.

#### 11 **Notes and Reports of Witness Interviews**

12 Agents notes or reports of interviews conducted with the witnesses should be disclosed as such  
 13 materials may provide inconsistent or different versions of events or representations made by the witness  
 14 with regard to the relevant facts in this case. The defendant would be permitted to examine the witnesses  
 15 with regard to any such differences or inconsistencies and could call the agents to give testimony for  
 16 purposes of impeachment at trial, if necessary.

#### 17 **Criminal Histories, Arrests Histories or Police Contact Histories of Witnesses**

18 In discovery, the government has provided a document received from the RCMP regarding police  
 19 contacts with defendant Kyle Gianis which contains references to all police arrests and contacts with  
 20 defendant. Presumably, the government has received similar report related to each of the witnesses  
 21 Tsoukalas and Youngberg.

#### 22 **Presentence Reports**

23 The Ninth Circuit has held that the defendant is entitled to have the Court conduct an in-camera  
 24 review of the probation files of critical co-conspirator witnesses. During such a review, the Court should  
 25 order the release of all materials contained therein that bear on the credibility of such witnesses in advance  
 26 of trial so that the defendant has the ability to use such information for purposes of investigation or cross

1 examination of that witness. United States v. Alvarez, 358 F.3d 1194, 1208 (9<sup>th</sup> Cir. 2004); United States  
2 v. Strifler, 851 F.2d 1197, 1201 (9<sup>th</sup> Cir. 1988). Presentence reports often contain details concerning  
3 witness's prior criminal records, details concerning witness's history of substance abuse or mental health  
4 problems as well as statements made by the witness regarding his involvement in the current offense. All  
5 of these areas would bear on the credibility of the witnesses and, if contained in the presentence report,  
6 should be disclosed.

#### 7 **Timing of Disclosures**

8 Defense requests that the Court order the above requested disclosures at least two weeks in  
9 advance of the depositions so defense counsel has adequate time to prepare and conduct investigation.

10 DATED this 24th day of April, 2008.

11 Respectfully submitted,

12 /s/ Peter A. Camiel

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s) and plaintiff.

/s/ Peter A. Camiel, WSBA #12596